UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 240

Docket No. PH-0432-09-0413-I-1

Cesar Lee,

Appellant,

v.

Environmental Protection Agency,

Agency.

December 9, 2010

Frank Finch, III, Philadelphia, Pennsylvania, for the appellant.

Gregory J. Smith, Philadelphia, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that affirmed his removal for unacceptable performance pursuant to 5 U.S.C. chapter 43. For the reasons set forth below, we GRANT the appellant's petition and AFFIRM the initial decision as MODIFIED, still AFFIRMING the agency's removal action.

BACKGROUND

¶2 The appellant was formerly employed as an Environmental Engineer, GS-12, with the Office of Federal Facility Remediation & Site Assessment in the Hazardous Site Cleanup Division for Region III. Initial Appeal File (IAF), Tab 4,

Subtab 4a at 1. At all times relevant to this appeal, he was assigned to serve as regional Docket Coordinator,[1] and his performance was evaluated by Kathleen Anderson, then Acting Chief of the Site Assessment & Non-NPL Federal Facilities (SANF) Branch. *Id.*, Subtabs 4h, 4u, 4v. On February 21, 2008, Anderson issued the appellant a summary rating of unsatisfactory for the performance evaluation period ending February 8, 2008. *Id.*, Subtab 4u at 2-10. Effective February 9, 2008, the agency placed the appellant on a new performance plan. *Id.*, Subtab 4h. By memorandum dated July 30, 2008, Anderson informed the appellant that his performance was unsatisfactory on the critical element of Program/Project Management and that he would be placed on a Performance Improvement Plan (PIP) for a period of 60 days, during which time he was to complete several itemized assignments. *Id.*, Subtab 4s. The PIP ended

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[1] Section 120(c) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. § 9620(c), requires the Environmental Protection Agency (EPA) to establish a Federal Agency Hazardous Waste Compliance Docket (Docket), which contains information reported to the EPA by federal facilities that manage hazardous waste or from which hazardous substances, pollutants, or contaminants have been or may be released. The Docket is used to identify federal facilities that must be evaluated to determine if they pose a threat to public health or welfare and the environment and to provide a mechanism to make this information available to the public. Section 120(d) of CERCLA provides that for each facility listed on the Docket, the EPA must take steps to assure that a preliminary assessment is conducted within a reasonable time. Following the preliminary assessment—and, if warranted, a site inspection—the EPA evaluates the site under the Hazard Ranking System to determine whether the site scores sufficiently high to warrant listing on the National Priorities List (NPL). If the EPA determines that the facility or site does not pose a threat sufficient to warrant Superfund action, the EPA will typically designate the site status as No Further Remedial Action Planned (NFRAP). The EPA publishes regular updates to the Docket in the *Federal Register*, adding, deleting, or correcting entries as needed and tracking changes in NFRAP status. In compiling the updated Docket, the EPA compares and reconciles the current Docket with information obtained from several databases, including the Resource Conservation and Recovery Information System (RCRAInfo) and the primary Superfund database, the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). *See generally* 73 Fed. Reg. 71644 (Nov. 25, 2008) (twenty-third Docket update); Docket Reference Manual (March 9, 2007 Interim Final), at IAF, Tab 26, Subtab H; Hearing Transcript at 101-04 (Anderson).

on September 30, 2008, and on October 10, 2008, Anderson issued a close-out memorandum, notifying the appellant that his performance on the critical element of Program/Project Management remained unsatisfactory. *Id*., Subtab 4g. By notice dated January 5, 2009, James J. Burke, Director, Hazardous Site Cleanup Division, proposed to remove the appellant for unacceptable performance. *Id*., Subtab 4f. The appellant provided a lengthy written response. *Id*., Subtab 4e. On March 27, 2009, James Newsom, Acting Deputy Regional Administrator, notified the appellant of his decision to remove him effective that same day. *Id*., Subtab 4b.

¶3 The appellant filed a timely appeal, raising affirmative defenses of harmful procedural error and discrimination based on national origin (Chinese). IAF, Tabs 1, 27. During the proceedings below, the appellant moved to recuse the administrative judge, but the administrative judge denied that motion, as well as the appellant's motion to certify the issue as an interlocutory appeal. IAF, Tabs 27, 34, 37, 39. Following a hearing, the administrative judge issued an initial decision affirming the removal action. IAF, Tab 43 (Initial Decision, Jan. 29, 2010).

¶4 On petition for review, the appellant renews his objections to the following pre-hearing rulings and determinations: (1) denial of his first motion to compel discovery; (2) denial of his second motion to compel discovery; (3) denial of his motion to disqualify the administrative judge and subsequent motion for certification of interlocutory appeal; (4) denial of witnesses Timothy Mott, Helen Shannon, and Charlene Creamer; (5) denial of his motion *in limine* to exclude agency evidence; and (6) partial denial of his motion for subpoenas. Petition for Review File (PFR File), Tab 1 at 3-21. In addition, the appellant contends that the administrative judge erred in various findings of fact and conclusions of law. Specifically, the appellant argues that, contrary to the initial decision: (1) the agency was required to show, but failed to show, that it obtained approval from the Office of Personnel Management (OPM) for the performance appraisal system

under which the appellant was rated and subsequent changes to that system; (2) the substantive performance standards were invalid and unreasonable; (3) the agency committed harmful error by removing him based in part on alleged unacceptable performance which took place more than 1 year prior to the proposal notice; (4) the agency committed harmful error in its implementation of the PIP; (5) his discrimination claim was supported by evidence, which he was denied the opportunity to obtain through discovery, that previous Docket Coordinators were not required to perform the same types of assignments; and (6) the record lacks substantial evidence that his performance during the PIP was unacceptable. *Id.* at 21-40. The agency has responded in opposition to the appellant's petition. PFR File, Tab 3.

ANALYSIS

Legal standard

¶5 To prevail in an appeal of a performance-based removal under chapter 43, the agency must establish by substantial evidence that: (1) OPM approved its performance appraisal system and any significant changes thereto; (2) the agency communicated to the appellant the performance standards and critical elements of his position; (3) the appellant's performance standards are valid under 5 U.S.C. § 4302(b)(1); (4) the agency warned the appellant of the inadequacies of his performance during the appraisal period and gave him a reasonable opportunity to demonstrate acceptable performance; and (5) the appellant's performance remained unacceptable in one or more of the critical elements for which he was provided an opportunity to demonstrate acceptable performance. *See* 5 U.S.C. §§ 4302(b), 7701(c)(1)(A); *Adamsen v. Department of Agriculture*, 563 F.3d 1326, 1331 (Fed. Cir.), *modified by* 571 F.3d 1363 (Fed. Cir. 2009); *Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 6 (2008); *DiPrizio v. Department of Transportation*, 88 M.S.P.R. 73, ¶ 7 (2001); *Johnson v. Department of the Interior*, 87 M.S.P.R. 359, ¶ 6 (2000). Substantial evidence is

the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1). Ordinarily, the Board will presume that OPM has approved the agency's performance appraisal system; however, if an appellant has alleged that there is reason to believe that OPM did not approve the agency's performance appraisal system or significant changes to a previously approved system, the Board may require the agency to submit evidence of such approval. *Adamsen*, 563 F.3d at 1330-31; *Daigle v. Department of Veterans Affairs*, 84 M.S.P.R. 625, ¶ 12 (1999).

¶6 If the action is supported by substantial evidence, the Board will sustain the action unless the appellant shows by a preponderance of the evidence that: (1) the agency committed harmful procedural error in reaching its decision; (2) the decision was based on a prohibited personnel practice under 5 U.S.C. § 2302(b); or (3) the decision was not in accordance with law. 5 U.S.C. § 7701(c); 5 C.F.R. § 1201.56(a)(2)(iii), (b). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2). The Board has no authority to mitigate a removal taken under chapter 43. *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558, 1566-67 (Fed. Cir. 1985).

The administrative judge's prehearing rulings do not warrant reversal.

¶7 The Board will not reverse an administrative judge's rulings on discovery matters absent an abuse of discretion. *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table). Moreover, an administrative judge's procedural error is of no legal consequence unless it is shown to have adversely affected a party's substantive rights. *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981). For the reasons discussed below, we find the appellant has not shown that the

administrative judge committed an abuse of discretion or that she committed a procedural error that prejudiced his appeal.

First Motion to Compel Discovery

¶8 On June 9, 2009, during the initial discovery period, the parties executed an Agreement to Mediate. IAF, Tab 10. The parties mutually stipulated that the appellant's deadline for filing a motion to compel discovery would be extended to 3 days following the conclusion of mediation efforts. *Id.* The mediator conducted a mediation on September 23, 2009, but the parties were unable to reach settlement. IAF, Tab 12. By order dated September 25, 2009, she indicated that the parties were unable to reach settlement and that she was terminating the mediation and returning the appeal to the presiding administrative judge. *Id.* Consequently, the deadline for the appellant to file a motion to compel discovery was September 28, 2009.

¶9 On September 28, 2009, the appellant filed a timely motion to compel the agency to produce two employees for depositions: Timothy Mott, the agency's National Docket Coordinator, and Helen Shannon, the Docket Coordinator for Region II. IAF, Tab 13. The appellant argued that the duties of a regional Docket Coordinator are the same from region to region and that Mott and Shannon were better suited than Anderson to provide expert testimony as to what those duties are. *Id.* In support of his claim, the appellant cited the deposition testimony of James Hargett, the appellant's temporary successor as Docket Coordinator, who indicated that Anderson was not in a position to be of expert assistance in connection with that work. *See id.*, Ex. E. With regard to Mott, the appellant also asserted that, as National Docket Coordinator, he is the work assignment manager for the regional Docket Coordinators, and the person to whom the regional Docket Coordinators report. In support of that claim, he cited the deposition testimony of Anderson, who indicated that Mott was the work assignment manager "for the national contract." *See id.*, Ex. D.

¶10 In response to the appellant's motion, the agency stated that regional Docket Coordinators do not report to the National Docket Coordinator but rather to the Branch Chief for the region and branch where they work. IAF, Tab 14. It was Anderson who assigned the appellant work, set his performance standards, and appraised the quality of his performance. *Id*. The agency provided a declaration by Mott, who stated under penalty of perjury that "[a]t no time in my position as National Docket Coordinator have I performed any supervisory duties or had any supervisory authority over the Appellant or any other Regional Docket Coordinator, including the assignment of work or assessment of performance." *Id*., Ex. A. Additionally, there was no indication that Shannon was similarly situated to the appellant such that she could have been considered a valid comparator. *See Spahn v. Department of Justice*, 93 M.S.P.R. 195, ¶ 13 (2003) (to be deemed similarly situated, all relevant aspects of the appellant's employment situation must be "nearly identical" to those of the comparator employee). The administrative judge did not abuse her discretion in finding that deposition of Mott and Shannon would not have provided information reasonably calculated to lead to the discovery of admissible evidence. *See* IAF, Tab 18; 5 C.F.R. § 1201.72(a).

Second Motion to Compel Discovery

¶11 The appellant filed his second motion to compel on October 15, 2009, more than 2 weeks after the deadline for filing such a motion had passed. IAF, Tab 16. He acknowledged that the deadline had passed but noted that the agency had filed a motion for summary judgment with respect to his discrimination claim on October 6, 2009. *Id*.; *see* IAF, Tab 15. The appellant argued that the agency's motion raised the possibility, not contemplated at the time the parties stipulated to the deadline for filing discovery motions, that the administrative judge would decide the discrimination claim without a hearing. Hence, the appellant contended, the agency should now be required to produce documentary evidence on the issue in the event he was denied the opportunity to obtain that information

through witness examination and review of documents produced in response to subpoenas. IAF, Tab 16. In particular, the appellant requested that the administrative judge compel the agency to provide information concerning the work assignments and performance standards and appraisals for five employees who had previously served as Region III Docket Coordinator. *Id.*

¶12 On October 20, 2009, the administrative judge denied the agency's motion for summary judgment, ruling that the appellant would have the opportunity at the hearing to present relevant evidence concerning his discrimination claim. IAF, Tab 20. Because that ruling rendered moot the appellant's rationale for extending the deadline for filing motions to compel, the administrative judge correctly treated the appellant's second motion to compel as untimely filed. IAF, Tab 21. Moreover, as the administrative judge noted, the appellant did not supply complete copies of his discovery requests and the agency's responses to those requests, as required under 5 C.F.R. § 1201.73(e)(1). *See* 5 C.F.R. § 1201.74(a) (an administrative judge may deny a motion to compel discovery if a party fails to comply with the requirements of 5 C.F.R. § 1201.73(e)(1)).

Motion for Issuance of Subpoenas

¶13 On November 13, 2009, the appellant filed a motion requesting the administrative judge to issue subpoenas to eight individuals. IAF, Tab 25. With the exception of proposing official James Burke, who had by then retired, each of the individuals in question was a current agency employee. *Id.* The appellant also requested a subpoena *duces tecum* for Human Resources employee Rose Ashnant, directing her to produce documents relating to the issue of OPM approval of the agency's performance appraisal system, as well as the documents which the appellant had previously requested in his second motion to compel. *Id.* In her order and summary of the November 16, 2009 prehearing conference, the administrative judge denied the appellant's motion. IAF, Tab 27.

¶14 We find that the administrative judge did not abuse her discretion in that ruling. Subpoenas are not ordinarily required to obtain the appearance of Federal

employees as witnesses. 5 C.F.R. §§ 1201.33, 1201.81(a). With regard to Burke, no subpoena was necessary because the administrative judge denied the appellant's request to call him as a witness, IAF, Tab 27 at 4-5, a ruling which the appellant no longer contests. The appellant's request for a subpoena *duces tecum* of Ashnant was an attempt to compel written discovery after the deadline for filing motions to compel had passed, and the administrative judge correctly treated it as such. *Id.* at 6. In any event, the administrative judge ordered the agency to produce several of the documents listed in the appellant's request for a subpoena *duces tecum*, in particular, those documents pertinent to the issue of OPM approval of the agency's performance appraisal system. *Id.*

Rulings on Witnesses

¶15 In his prehearing submission, the appellant requested eleven witnesses, including himself. IAF, Tab 26 at 18-19. At the November 16, 2009 prehearing conference, the administrative judge advised the appellant that she did not need to hear from Burke, the proposing official. IAF, Tab 27 at 4. In addition, she sustained the agency's objections to proposed witnesses Charlene Creamer, Timothy Mott, Helen Shannon, and James Hargett based on relevance. *Id.* at 5. The administrative judge also sustained the agency's objection to proposed witness Steve Johnson, but indicated that she would entertain a request to have him testify on rebuttal. *Id.* The appellant objected to the administrative judge's rulings on all six excluded witnesses, and submitted an offer of proof with respect to Hargett, Mott, Shannon, and Creamer. *Id.*; IAF, Tab 31. After reviewing the offer of proof, the administrative judge granted the appellant's request to call Hargett, and affirmed her previous ruling with regard to Creamer. IAF, Tab 36. The administrative judge further stated that she would entertain an appropriate request to call Mott and Shannon on rebuttal. *Id.* On petition for review, the appellant appears to have abandoned his objections with regard to Johnson and Burke, but he argues that the administrative judge abused her discretion with regard to Mott, Shannon, and Creamer. PFR File, Tab 1 at 13-15.

¶16 An administrative judge has wide discretion under 5 C.F.R. § 1201.41(b)(8), (10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious. *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985). We discern no abuse of discretion in this case. As discussed above, the administrative judge had already properly denied the appellant's motion to compel depositions of Mott and Shannon, based in part on the declaration of Mott, who stated that he had no part in supervising regional Docket Coordinators or in assigning or evaluating their work. IAF, Tabs 14, 18. The appellant now contends that, because he was not permitted to depose Mott or call him as a witness, he was "deprived of the opportunity to explore who actually authored the Mott declaration and to challenge or seek clarification of the statements contained therein." PFR File, Tab 1 at 14. The complaint lacks merit, because the appellant was not in fact deprived of that opportunity. The administrative judge informed the appellant that she would entertain a request at the hearing to call Mott or Shannon as a rebuttal witness, and the appellant failed to make such a request. IAF, Tab 34.

¶17 The administrative judge also properly exercised her discretion in excluding Creamer, who served as the appellant's acting supervisor from January or February 2007 until June 2007, while Anderson was on detail. The appellant stated that Creamer would testify on the following issues: (1) the apparent circumvention of merit selection procedures by Sokolowski in order to appoint Anderson as the appellant's immediate supervisor; (2) the agency's handling of Creamer's positive 2007 mid-year assessment of the appellant's performance; and (3) her disagreement with Anderson's assessment of the appellant's performance. IAF, Tab 26 at 13-16, 19; Tab 31 at 4 & Ex. B; *see also* PFR File, Tab 1 at 14-15. However, the period in question here, i.e. the appellant's performance from July 30 to September 30, 2008, was sufficiently long after Creamer's stint as the appellant's acting supervisor to render his testimony with regard to the

appellant's performance during his PIP less than probative. Consequently, the administrative judge did not abuse her discretion in excluding Creamer.

Motion to Disqualify the Administrative Judge/Motion for Certification of an Interlocutory Appeal

¶18 Shortly after the prehearing conference, on November 18, 2009, the appellant filed a motion to disqualify the administrative judge under 5 C.F.R. § 1201.42(b). IAF, Tab 28. Specifically, the appellant argued that the administrative judge and agency counsel, Gregory J. Smith, were acquainted as former colleagues in the legal department of the U.S. Postal Service, and that this association, in combination with her adverse rulings, would cause a reasonable person to question her impartiality. *Id*. The agency responded, and the administrative judge denied the appellant's motion by order dated December 2, 2009. IAF, Tabs 33, 34. The appellant subsequently moved for the administrative judge to certify an interlocutory appeal of her ruling, pursuant to 5 C.F.R. § 1201.43(c), and the administrative judge also denied that motion. IAF, Tabs 37, 39.

¶19 The Board's regulations provide that a party may file a motion asking the administrative judge to withdraw "on the basis of personal bias or other disqualification." 5 C.F.R. § 1201.42(b). This case is unusual in that the appellant did not allege in his motion that the administrative judge was biased but rather that she was otherwise disqualified. IAF, Tab 28. The appellant contends that in denying his recusal motion, the administrative judge did not correctly apply the standard appropriate for motions to disqualify on grounds other than bias. PFR File, Tab 1 at 10-13.

¶20 We agree. In determining whether an administrative judge should be disqualified on grounds other than bias, the Board's policy is to follow the standard set out at 28 U.S.C. § 455(a):

> Under 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his

> impartiality might reasonably be questioned." Although the Board is not bound by section 455(a), inasmuch as the Board is not a court, the Board has held that it "see[s] no reason not to look to the rule and case law arising from 28 U.S.C. § 455 where relevant. . . ." The goal of section 455(a) is to avoid even the appearance of partiality. Thus, the test applied is not whether a judge is in fact biased or prejudiced, but whether a judge's impartiality might reasonably be questioned. In enacting section 455(a), Congress created an objective standard under which disqualification of a judge is required when a reasonable person, knowing *all* the facts, would question the judge's impartiality. In applying this standard, it is critically important to identify the facts that might reasonably cause an objective observer to question the judge's impartiality.

Shoaf v. Department of Agriculture, 97 M.S.P.R. 68, ¶ 7 (2004) (internal citations omitted).[2]

¶21 In denying the recusal motion, the administrative judge correctly took into account that the appeal does not involve the Postal Service, and that there was a lack of temporal proximity with her professional association with Mr. Smith. IAF, Tab 34. However, she also relied in part on factors unrelated to the "appearance of partiality" standard:

> The undersigned has been an administrative judge of the [Board] since April 2, 2006. After her appointment, it was determined by the Board's ethics counsel that she should not preside over Postal Service cases for one year. Since that one year moratorium expired, she has presided over numerous Postal Service cases, including appeals that have proceeded to a hearing and cases in which former colleagues have represented the Postal Service.
>
> It is further noted that in addition to former colleagues, the undersigned administrative judge routinely presides over appeals in

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[2] We note that in *Greenberg v. Board of Governors of Federal Reserve System*, 968 F.2d 164, 167 (2d Cir. 1992), the U.S. Court of Appeals for the Second Circuit held that the "mere appearance of impropriety" standard of 28 U.S.C. § 455(a) does not apply to administrative law judges. However, the court based its holding on the fact that administrative law judges "are employed by the agency whose actions they review," and consequently they "would be forced to recuse themselves in every case." *Id.* That rationale does not apply to the Board's administrative judges, who are not employed by the agencies whose actions they review.

> which former adversaries . . . are representing one of the litigants. Likewise, former colleagues, adversaries and clients often are named as and appear as witnesses in cases handled by Judge Svendsen. To expect her to recuse herself in each and every one of these matters would be unreasonable and unduly burdensome to the Board and other administrative judges in the Northeastern Regional Office.

Id. For purposes of ruling on the motion, it was not pertinent that the administrative judge had complied with the instructions of the Board's ethics counsel or that she did not have a practice of recusing herself in appeals where former colleagues or adversaries represented one of the parties. Nor was the convenience of other administrative judges or the Board as a whole a relevant consideration. Under *Shoaf*, the question before the administrative judge was simply whether the facts were such that a reasonable person in possession of the relevant facts would question her impartiality.

¶22 Nevertheless, we agree with the administrative judge that a reasonable, objective observer would not question her impartiality based on the unremarkable fact that she and the agency representative had been coworkers years before at an agency that is not a party to this appeal. We further note that, even while correctly denying the appellant's second motion to compel and motion for subpoenas, the administrative judge displayed evenhandedness in ordering the agency to produce much of the information the appellant requested. *See* IAF, Tabs 21, 27. Under these circumstances, the administrative judge did not abuse her discretion in denying the appellant's recusal motion. Indeed, a judge "is as much obligated not to recuse himself when it is not called for as he is obliged to when he is." *Washington v. Department of the Interior*, 81 M.S.P.R. 101, ¶ 15 (1999) (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988)).

¶23 We further find that the administrative judge did not abuse her discretion in denying the appellant's motion to certify the issue as an interlocutory appeal pursuant to 5 C.F.R. § 1201.42(c). Our regulations provide that an administrative

judge will certify a ruling for review only if, inter alia, the ruling "involves an important question of law or policy about which there is substantial ground for difference of opinion." 5 C.F.R. § 1201.92(a). The denial of the appellant's recusal motion does not involve an important question of law or policy, as the Board has already decided the standard it will apply in determining whether an administrative judge should be disqualified on grounds other than bias. *See Shoaf*, 97 M.S.P.R. 68, ¶ 7; *see also Keefer v. Department of Agriculture*, 92 M.S.P.R. 476, ¶ 7 (2002) (finding an administrative judge acted within his discretion in declining to certify a ruling on a recusal motion based on "other disqualification" as an interlocutory appeal because, on its face, the issue did not involve an important question of policy or law).

Denial of the Motion in Limine to Exclude Agency Evidence

¶24 In his motion *in limine*, filed December 3, 2009, the appellant requested that the administrative judge bar the agency from introducing any documents or testimony regarding his performance. IAF, Tab 35. The appellant based his motion on the agency's alleged failure to produce adequate evidence that OPM had approved the performance appraisal system under which his performance was rated, or that OPM had approved the February 9, 2008 changes to his performance standards. *Id*. It is true that, in the absence of OPM approval, a chapter 43 action must be reversed regardless of the appellant's performance. *See Cole v. Internal Revenue Service*, 25 M.S.P.R. 564, 565 n.* (1985) (the harmful error doctrine does not apply to the issue of OPM approval of an agency's performance appraisal plan). However, as discussed below, the agency in fact provided all the evidence necessary to meet its burden of proof with respect to OPM approval of its performance appraisal system, and the record does not show that the agency made significant alterations to that system. Furthermore, changes to an employee's performance standards do not require OPM approval. *Adamsen*, 571 F.3d at 1363. Accordingly, we find that the

administrative judge did not abuse her discretion in denying the appellant's motion *in limine*.

The administrative judge's findings of fact and conclusions of law do not provide a basis for reversal of the initial decision.

OPM approval of the performance appraisal system

¶25 Because the appellant alleged below that there was reason to doubt whether OPM approved the performance appraisal system under which he was rated, the burden was on the agency to produce evidence of OPM approval. *See Adamsen*, 563 F.3d at 1330-21; *Daigle*, 84 M.S.P.R. 625, ¶ 12. The agency initially submitted evidence of OPM approval in the form of a letter from OPM, dated March 3, 2005, granting the agency's January 27, 2005 request for approval of its performance appraisal system, and a copy of the approval request itself, including a completed OPM Form 1631 (Performance Appraisal System Description) and a three-page attachment thereto. IAF, Tab 4, Subtab 4z. Nevertheless, the administrative judge proceeded to issue multiple orders directing the agency to produce evidence that OPM had approved the pertinent performance appraisal system. IAF, Tabs 21, 27 at 6. In response to the first such order, the agency complied by resubmitting the aforementioned documents. IAF, Tab 24 at 17-22. In response to the second order, the agency provided a declaration by an OPM Human Capital Officer, Jodi Guss, who stated under penalty of perjury that, "[a]fter a diligent search and upon information and belief," the documents which the agency had submitted "comprise the entire record in the possession of OPM in connection with the EPA's January 27, 2005 request and subsequent approval of its Performance Appraisal System." IAF, Tab 38; *see also* IAF, Tab 32.

¶26 On petition for review, the appellant argues that the agency did not meet its burden of proof because it failed to establish that he was covered by the same performance appraisal system that OPM approved on March 3, 2005. PFR File, Tab 1 at 22. The appellant further contends that the agency made changes to its performance appraisal system in February 2008, by moving from a 3-tiered rating

system to a 5-tiered system and shortening his appraisal period, and failed to show that OPM approved those changes. *Id.* at 22-25.[3] Both of these arguments are without merit.

¶27 First, OPM indicated in its March 3, 2005 approval letter that the approved performance appraisal system applies to "all agency non-Senior Executive Service employees other than those excluded by 5 U.S.C. § 4301(2) or excepted service employees excluded by OPM regulation." IAF, Tab 4, Subtab 4z. The appellant was in the competitive service, not the Senior Executive Service or excepted service, and was therefore covered by the appraisal system. *See id.*, Subtab 4a. Furthermore, there is nothing in the record to suggest that the appraisal system OPM approved on March 3, 2005, was no longer in effect when the appellant's performance was rated as unsatisfactory. We note that, effective August 1, 2007, the agency established a Performance Appraisal and Recognition System" (PARS) for the appellant's bargaining unit, pursuant to Article 34 of the collective bargaining agreement between the agency and the American Federation of Government Employees. IAF, Tab 4, Subtab 4w; IAF, Tab 42. Despite its name, however, PARS was not a new performance appraisal system requiring OPM approval but rather an appraisal program created under the agency-wide appraisal system approved on March 3, 2005. *See* 5 C.F.R. § 430.203 (defining "appraisal program" as "the specific procedures and requirements established under the policies and parameters of an agency appraisal system"); IAF, Tab 4, Subtab 4z at 5 (setting forth criteria and procedures for establishing separate appraisal programs). In the absence of any evidence that the agency replaced the

[3] In the same section of his petition, the appellant also objects that Anderson imposed a PIP without first placing him on a Performance Assistance Plan (PAP), which, according to the appellant, was required under the applicable collective bargaining agreement. PFR File, Tab 1 at 22-24. This complaint is not relevant to the issue of OPM approval but rather appears to constitute a claim of harmful error, which we will address below.

appraisal system OPM approved on March 3, 2005, we find that the agency has shown by substantial evidence that OPM approved the appraisal system under which the appellant was rated. Furthermore, contrary to the appellant's assertions below, the agency submitted the complete text of that appraisal system.[4]

¶28 Second, the record does not indicate that the agency significantly altered its OPM-approved performance appraisal system in February 2008 or at any other time prior to the appellant's removal. Although the agency made changes to the appellant's performance plan in February 2008, those changes do not evidence an alteration of the underlying appraisal system, much less a significant alteration of the appraisal system requiring OPM approval. The appraisal system which OPM approved on March 3, 2005, provides for performance plans with a minimum of two and a maximum of five appraisal levels for each critical element, and the appellant's February 2008 appraisal plan complies with that requirement. IAF, Tab 4, Subtab 4z at 6; *id*., Subtab 4h. With respect to the appraisal period, the OPM-approved appraisal system provides that "[a]ll programs will have a 1-year appraisal period, except as needed to accommodate program transition," and that the minimum length of an appraisal period will be 90 days. IAF, Tab 4, Subtab 4z at 3, 6. Consistent with those provisions, PARS sets an appraisal period from

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[4] The appellant alleged below that the agency failed to include various items referred to in its submission: (a) the agency performance appraisal system approved by OPM on July 23, 1997; (b) a description of the summary level patterns approved in July 1997 and the additional patterns submitted for approval on January 27, 2005; (c) the attachment referred to at the top of page 006, describing "other restrictions/requirements for using patterns and/or deriving summary levels"; and (d) the attachment referred to near the bottom of page 006, describing "criteria and procedures for establishing separate appraisal programs." IAF, Tab 35 at 4; *see also* PFR File, Tab 1 at 15 n.3. With respect to (a), the agency's submission to OPM merely refers in passing to the appraisal system OPM approved on July 23, 1997, and it is unnecessary to refer to the text of that system to determine the substance of the system which OPM approved on March 3, 2005. With respect to (b), the summary level patterns to which the submission refers are the same as those described at 5 C.F.R. § 430.208(d). IAF, Tab 4, Subtab 4z at 3. Items (c) and (d) are included in the attachment to OPM Form 1631. *See Id.* at 5.

January 1, 2008, to September 30, 2008, to accommodate a transition to appraisal periods running from October 1 to September 30. IAF, Tab 4, Subtab 4w at 7. The appellant objects that in his case the agency set a somewhat shorter appraisal period, running from February 9, 2008, to September 30, 2008. *See id.*, Subtab 4h at 1, 4i at 1. However, this apparent inconsistency between the appellant's performance plan and the PARS appraisal program does not constitute a change to the underlying appraisal system. To the extent the agency may have made a procedural error in setting the appellant's appraisal period, he has not explained how that error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 681 (1991).

Validity of the performance standards

¶29 Because the appellant has not alleged that the agency failed to communicate the performance standards to him, we proceed to his allegation that the standards were invalid. Title 5 U.S.C. § 4302(b)(1) requires that performance standards, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria related to the job in question. Standards must be reasonable, realistic, attainable, and clearly stated in writing. *Thomas v. Department of Defense*, 95 M.S.P.R. 123, ¶ 12 (2003), *aff'd*, 117 F. App'x 722 (Fed. Cir. 2004). Provided those requirements are met, however, the Board will defer to managerial discretion in determining what agency employees must do in order to perform acceptably in their positions. *Jackson v. Department of Veterans Affairs*, 97 M.S.P.R. 13, ¶ 14 (2004).

¶30 The appellant contends that what the agency described as "Critical Element #1" of the performance plan commencing February 9, 2008, actually

consisted of 30 distinct tasks, each of which was itself a critical element.[5] PFR File, Tab 1 at 25-26; *see* IAF, Tab 4, Subtab 4h at 5, 7-8. In support of that assertion, the appellant cites the testimony of Anderson who, when prompted by the appellant's attorney, agreed that "[a]ll of the measures and metrics contained in Critical Element #1 of the performance plan are critical elements." Hearing Transcript at 114. According to the appellant, the agency thereby "doomed [him] to failure by sabotaging him with an overload of critical tasks." PFR File, Tab 1 at 26. He further contends that the standards are inconsistent with PARS, which requires a minimum of two and a maximum of five critical elements for each performance plan. *Id.*; *see* IAF, Tab 4, Subtab 4w at 9. In addition, the appellant objects that it was unreasonable to expect him to complete his assignments within the shortened 7-month appraisal period. PFR File, Tab 1 at 26-27.

¶31 Notwithstanding Anderson's testimony, we find that the measures, metrics, and focus areas listed under Critical Element #1 of the appellant's February 2008 performance plan are not distinct critical elements but rather subelements of a single responsibility, i.e., serving as regional Docket Coordinator. The Board has long held that a critical element may include subelements and that the incumbent of a position for which a compound standard has been established may be required to perform acceptably with respect to each of those subelements. *Shuman v. Department of the Treasury*, 23 M.S.P.R. 620, 627-28 (1984). The measures, metrics, and focus areas listed under Critical Element #1 are consistent with the appellant's job description. *See* IAF, Tab 4, Subtab 4v. Furthermore, the measures, metrics, and focus areas are in the nature of ongoing tasks, and thus were not rendered unreasonable by the shortened performance appraisal period. *See id.*, Subtab 4h at 5, 7-8.

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[5] Title 5 C.F.R. § 432.103(b) defines "critical element" as "a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable."

Opportunity to demonstrate acceptable performance

¶32 The employee's right to a reasonable opportunity to improve is a substantive right and a necessary prerequisite to all chapter 43 actions. *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 590 (1984). In determining whether an agency has afforded an employee a reasonable opportunity to demonstrate acceptable performance, relevant factors include the nature of the duties and responsibilities of the employee's position, the performance deficiencies involved, and the amount of time which is sufficient to enable the employee with an opportunity to demonstrate acceptable performance. *Macijauskas v. Department of Army*, 34 M.S.P.R. 564, 566 (1987), *aff'd*, 847 F.2d 841 (Fed. Cir. 1988). Here, the agency afforded the appellant a 60-day PIP in which he was to complete six enumerated tasks. IAF, Tab 4, Subtab 4s at 5-6. Anderson found the appellant's performance unsatisfactory based primarily on his failure to complete the first two tasks: (1) to resolve all inconsistencies between the Docket information for region III and the information in databases used to obtain information for the Docket, e.g., CERCLIS; and (2) to prepare a list of revisions, deletions, and additions in advance for Update #24 to the national Docket. *Id.*, Subtabs 4g, 4s at 5-6.

¶*33* The appellant contends on petition for review that the 60-day duration of the PIP was unreasonably short. PFR File, Tab 1 at 33-34. However, as the administrative judge found, there is no merit to this claim. The Board has found that a 30-day PIP can satisfy an agency's obligation to provide an employee with a reasonable opportunity to demonstrate acceptable performance. *Melnick v. Department of Housing & Urban Development*, 42 M.S.P.R. 93, 101 (1989), *aff'd*, 889 F.2d 1228 (Fed. Cir. 1990) (Table). Further, it is undisputed that at the time the Docket included 260 sites in Region III, which covers Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia. Hearing Transcript at 81 (Anderson); *see* IAF, Tab 4, Subtab 4j at 6-12. Anderson testified without contradiction that she personally completed task (1)

with respect to the Maryland sites, which constitute about 20 percent of the total sites for the region, in approximately half a day. Hearing Transcript at 131-33. Anderson also testified that the appellant did not have to complete these tasks, from start to finish, within 60 days. Rather, he was tasked with finishing assignments he had begun over a year before. *Id.* at 131. Hence, it was not unreasonable to expect the appellant to complete tasks (1) and (2) for the entire region within the 60 days allotted.

Performance during the PIP

¶34 The appellant contends that, for two reasons, the administrative judge erred in finding that the agency met its burden of proving by substantial evidence that his performance during the PIP was unacceptable. First, he argues even if his performance was unsatisfactory with respect to tasks (1) and (2), the record lacks substantial evidence that he merited a rating of unacceptable for Critical Element #1 as a whole. PFR File, Tab 1 at 33-35. Second, he contends that the agency failed to show by substantial evidence that his performance on those two tasks was unsatisfactory in the first instance. *Id*. at 35-40.

¶35 With respect to his performance on tasks (1) and (2), the appellant objects that the agency did not produce copies of certain spreadsheets and data entry forms mentioned in the PIP closeout letter. PFR File, Tab 1 at 36-37. However, Anderson provided sworn testimony concerning the appellant's errors and omissions—and in any case the appellant does not claim to have resolved all Docket inconsistencies or completed the spreadsheet itemizing revisions, deletions, and additions in preparation for Update #24. Accordingly, we find that the administrative judge did not err in finding that the agency showed by substantial evidence that the appellant's performance on tasks (1) and (2) was unacceptable.

¶36 Where, as here, an appellant's performance was unacceptable on one or more, but not all, components of a critical element, the agency must show substantial evidence that the appellant's performance warranted an unacceptable

rating on the element as a whole. *Adkins v. Department of Housing & Urban Development*, 781 F.2d 891, 895 (Fed. Cir. 1986); *Shuman*, 23 M.S.P.R. at 628. The evidence the agency may submit to satisfy its burden of proof on this point includes evidence that the employee knew or should have known the significance of the subelement or subelements at issue and evidence showing the importance of the subelement or subelements in relation to the duties and responsibilities with which the critical element as a whole is concerned. *Adkins*, 781 F.2d at 895; *Shuman*, 23 M.S.P.R. at 628-29.

¶37 In finding that the agency had met its burden, the administrative judge cited *Vyas v. Department of the Army*, 83 M.S.P.R. 452, ¶¶ 2, 4 (1999), in which the Board affirmed a chapter 43 removal based on the appellant's unsatisfactory performance on five out of six performance objectives. Initial Decision at 13. On petition for review, the appellant observes that unsatisfactory performance on two out of six objectives is a significantly smaller numerical proportion. PFR File, Tab 1 at 34-35. However, an agency need not show that an employee's performance was unacceptable on a majority of subelements in order to prove unacceptable performance on the critical element as a whole. *See, e.g.*, *Rogers v. Department of Defense Dependents Schools, Germany Region*, 814 F.2d 1549, 1554 (Fed. Cir. 1987) (unsatisfactory performance on one of six components of one critical element and two of four components of another warranted an unacceptable rating on both critical elements). Here, the agency provided substantial evidence that the appellant was or should have been aware that the successful completion of tasks (1) and (2) was central to the very purpose of the regional Docket Coordinator position, i.e., to assist the agency with its statutory obligation to maintain and provide regular updates to the federal Docket. *See* 42 U.S.C. § 9620(c); Hearing Transcript at 81-86, 105-06 (Anderson); IAF, Tab 4, Subtab 4v (position description); Docket Reference Manual (March 9, 2007 Interim Final), at IAF, Tab 26, Subtab H. Accordingly, we find that the administrative judge did not err in finding that the agency established by

substantial evidence that the appellant's performance was unsatisfactory on Critical Element #1 as a whole.

Harmful error claims

¶38 We further find that the administrative judge was correct in rejecting the appellant's claims of harmful error. The appellant contends that the agency committed harmful error by developing the PIP without his consultation. PFR File, Tab 1 at 30-31. As he correctly notes, PARS requires that a supervisor develop a PIP in consultation with the employee. IAF, Tab 4w at 21. However, the appellant does not explain with any specificity how he was harmed by the alleged lack of consultation but simply reiterates his objections to the length of the PIP and the breadth of the assignments. PFR File, Tab 1 at 30-31. Furthermore, whatever suggestions the appellant might have offered during the consultation process, PARS provides that a PIP will be implemented regardless of whether the employee approves or agrees to sign it. IAF, Tab 4w at 23. Hence, even if the agency did commit procedural error with respect to the consultation requirement, the appellant has not shown how it affected the outcome of the PIP and the agency's subsequent removal action. *See Stephen*, 47 M.S.P.R. at 681.

¶39 Furthermore, the appellant did not establish that Anderson erred by not placing him on PAP before issuing a PIP during the same appraisal period. *See* PFR File, Tab 1 at 24. Contrary to the appellant's assertion on petition for review, PARS does not require that, for any performance appraisal period, a PAP be issued prior to a PIP. While § 29B of PARS states that this will "ordinarily" be the case, the same section provides that an employee "may immediately be placed on a PIP." IAF, Tab 4, Subtab 4w at 22.

¶40 There is also no merit to the appellant's contention that the agency improperly based the action in part on instances of alleged unacceptable performance which took place more than 1 year prior to the date of the proposal notice. PFR File, Tab 1 at 27-29; *see* 5 U.S.C. § 4303(c)(2)(A). The administrative judge correctly found that, although the July 30, 2008 notice

placing the appellant on a PIP refers by way of background to a previous PIP that ran from November 30, 2007, to February 8, 2008, it is clear from the proposal notice, the decision letter, and the testimony of the deciding official that the agency's decision to remove him was based solely on his performance during the PIP that ran from July 30, 2008, to September 30, 2008. IAF, Tab 4, Subtabs 4b, 4f, 4s; Hearing Transcript at 230 (Newsom).

Discrimination claim

¶41 Ordinarily, to establish a claim of prohibited employment discrimination under Title VII based on circumstantial evidence, an employee first must establish a prima facie case; the burden of going forward then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action; and, finally, the employee must show that the agency's stated reason is merely a pretext for prohibited discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). While the necessary elements of a prima facie case of prohibited discrimination vary according to the particular facts and circumstances at issue, a person claiming employment discrimination under Title VII carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on an impermissible criterion. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 575-76 (1978). One way in which an employee may establish a prima facie case is by introducing preponderant evidence to show that he is a member of a protected group, that he was similarly situated to an individual who was not a member of the protected group, and that he was treated more harshly or disparately than the individual who was not a member of his protected group. *Buckler v. Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997).

¶42 Here, the administrative judge found that the appellant failed to establish a prima facie case of national origin discrimination. Initial Decision at 13-14. However, because the record is complete and the agency has already articulated a

legitimate, nondiscriminatory reason for its action, i.e., his alleged unsatisfactory job performance, the agency has done everything that would be required of it if the appellant had made out a prima facie case, and whether he in fact did so is no longer relevant. *Bowman v. Department of Agriculture*, 113 M.S.P.R. 214, ¶ 7 (2010); *Marshall v. Department of Veterans Affairs*, 111 M.S.P.R. 5, ¶ 16 (2008). Rather, the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met his overall burden of proving illegal discrimination, that is, whether the appellant has produced sufficient evidence to show that the agency's proffered reason was not the actual reason for the removal and that the agency intentionally discriminated against him. *Bowman*, 113 M.S.P.R. 214, ¶ 7; *Marshall*, 111 M.S.P.R. 5, ¶ 17. The evidence to be considered at this stage may include: (1) the elements of the prima facie case; (2) any evidence the employee presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination or retaliation that may be available to the employee, such as independent evidence of discriminatory statements or attitudes on the part of the employer, or any contrary evidence that may be available to the employer, such as a strong track record in equal opportunity employment. *Marshall*, 111 M.S.P.R. 5, ¶ 17.

¶43 The administrative judge found that, in support of his claim, the appellant alleged only that his second level supervisor, Sokolowski, "commented that he was mysterious and never left his cubicle except to use the restroom or kitchen." Initial Decision at 13. We agree with the appellant that this finding was in error. The appellant also testified below that he had "seen in the files" that his five predecessors in the Region III Docket Coordinator position, none of whom were Chinese, were not required to perform the same types of assignments he was required to perform and that Sokolowksi was the only individual who was constant in the supervisory chain. Hearing Transcript at 382-85. Nevertheless, we find that the appellant's vague testimony, unsupported by documentary evidence, is insufficient to establish by preponderant evidence that the agency's

action was the result of national origin discrimination. The appellant contends that, had the administrative judge granted his second motion to compel and his motion for a subpoena *duces tecum*, he could have obtained documents that would establish that he was treated differently from his predecessors. PFR File, Tab 1 at 32-33. However, as discussed above, the appellant failed to submit a timely motion to compel production of those documents, and the administrative judge properly denied his belated efforts to obtain them. Accordingly, we find that the administrative judge reached the correct conclusion in rejecting the appellant's discrimination claim.

ORDER

¶44 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no

later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your

representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.